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Hoosier Environmental Council

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Environmental Law & Policy Center

August 20, 2010

Lisa Jackson, Administrator
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

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AUG 23 2010
OFFICE OF REGIONAL ADMINISTRATOR

Re: Petition for Corrective Action Regarding the Indiana NPDES Program – New Information on Indiana Department of Environmental Management's Refusal to Comply with NPDES Permit Requirements when Allowing Pollution under General Permit Rules.

Dear Administrator Jackson:

On December 17, 2009, Hoosier Environmental Council, Sierra Club and the Environmental Law and Policy Center ("ELPC") filed a petition under 40 CFR § 123.64 to correct serious defects in the Indiana water program (hereinafter "Dec. 17, 2009 Petition"). A major portion of the Dec. 17, 2009 Petition concerned the Indiana general permit rules that were adopted outside the federally-sanctioned procedures for adoption of general permits (40 CFR Part 124), which were instead adopted by rule by the Indiana Water Pollution Control Board.

In the eight months since the filing of the Dec. 17, 2009 Petition, EPA Region 5 has found that the manner of adoption and the length of the Indiana "general permits by rule" are inconsistent with the Clean Water Act (see March 9, 2010 Letter of Action Regional Administrator Bharat Mathur, Ex. A). However, other than sending the letter, Region 5 has not taken any action to address the inconsistencies between the requirements of the Clean Water Act and Indiana's general permits by rule. Consequently, the Indiana Department of Environmental Management ("IDEM") continues to permit activities pursuant to those general permit rules despite the Region 5 finding. In fact, IDEM has authorized new or modified discharges from at least 15 coal mines since our groups sent the December 17, 2009 Petition.

As detailed below, IDEM has recently stated that it plans to continue to issue general permits for coal mining operations and believes that it is legally restricted by the general permit rules from taking even the minimum steps that federal regulations recognize as necessary for issuance of a valid NPDES permit. Further, IDEM's permit scheme does not allow for public comment or hearing prior to its approval of these discharges.

IDEM's continued reliance on the Indiana general permit rules will undoubtedly allow coal mines to operate under a system which does not prevent discharges from causing or contributing to violations of water quality standards, to the detriment of public health and the environment. IDEM's continued failure to comport with the federal minimum standards for the issuance of a valid NPDES permit is clearly grounds for program withdrawal. 40 CFR § 123.63(a)(2)(ii) and (5).

Indiana is not acting to halt this illegal and environmentally damaging conduct. Indeed, IDEM claims that its failure to comply with the barest requirements of the Clean Water Act NPDES program is mandated by state law.

While we recognize that your agency has many responsibilities, Indiana's failure to comply with Clean Water Act NPDES requirements when authorizing discharges is now so conspicuous and environmentally damaging that EPA is obligated to step in and take immediate action. For the reasons summarized below, it would be an abuse of discretion for EPA to further delay granting our petition or otherwise act to assure at least minimal compliance with the Clean Water Act in Indiana.

I. Acting under color of illegally-adopted "general permits by rule," IDEM authorizes discharges from coal mines without making any attempt to prevent pollution known to be associated with coal mining.

As explained in the Dec. 17, 2009 Petition, the Indiana general "permits by rule" were adopted without any pretense to compliance with federal regulations and are plainly not protective of water quality. (December 17, 2009 Petition, pp.17-21) Petitioners have asked IDEM to cease using these general permit rules and are attempting to appeal IDEM's refusal to consider discharges from large new or expanding coal mines on an individual basis. In response to an appeal of one such decision by IDEM to allow a coal operation to proceed under general permit Rule 7, IDEM has very recently stated clearly that it has not, will not, and (in its view, at least) cannot follow the basic rules and procedures required by the Clean Water Act to protect water quality and allow public participation.

In particular, in response to interrogatories filed in Objection to the Modification Request for NPDES General Permit No. ING040062, IDNR Permit No. S-287 Farmersburg Mine – Peabody Midwest Mining LLC, Pimento, Sullivan County, Indiana (Cause No. 10-W-J-4350) (hereinafter

"Farmersburg Mine Appeal") on July 16, 2010, IDEM states without equivocation that it did not take any of the basic steps needed to prevent violations of water quality standards. In IDEM's Responses to HEC's Interrogatories and requests for documents (Ex. B), IDEM states:

- Prior to granting the modification, "it did not analyze the predicted chemical composition of discharge from the Farmersburg mine," (p. 4)
- It "did not review any assessments of the condition of the receiving waters and waters downstream of the Farmersburg Mine discharge prior to granting the modification," (p.5) and
- It "did not analyze the impact of the discharge from the mine on the receiving water and waters downstream prior to granting the modification." (p. 5)

Further, in the response to interrogatories, IDEM fully admitted that it did not analyze the impact of the pollution allowed by the permit on Busseron Creek, a Section 303(d)-listed water for which a TMDL has been prepared (p.6) or review the impact of the proposed discharge on the Busseron Creek watershed (p.7). Nor did IDEM consider the potential discharge of a long list of pollutants known to be present in discharges from Indiana coal mines (p.9), some of which are also discussed in EPA's recent Detailed Guidance: Improving EPA review of Appalachian Surface Coal Mining Operation under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, April 1, 2010.

Still further, IDEM did not require monitoring for most of these pollutants (Ex. B, p. 9) or even review discharge monitoring reports prior to allowing the modification (p. 11). The discharge monitoring reports in fact show that, even within the year preceding IDEM's authorization to discharge, the operator violated several of the few limits that are provided for in the Indiana general permit rule 7.

IDEM's Memorandum in Support of its Motion to Dismiss (hereinafter "Memorandum," Ex. C) shows with certainty that IDEM's failure to take basic precautions in allowing new pollution or to require obviously needed permit limits and monitoring was not some sort of accident unique to the Farmersburg Mine. In this signed pleading, IDEM makes clear that it does not comply with basic federal NPDES permitting requirements as to any activity covered by any one of Indiana's general permits by rule.

In moving to dismiss claims brought by Hoosier Environmental Council and ELPC that IDEM should have acted to prevent damage to the environment by studying the receiving waters, the potential constituents of the discharge and the reasonable potential for violation of state water quality standards (see 40 CFR § 122.44(d)), IDEM wrote in its Memorandum:

> In 1996, Ind. Code 12-18-18, et seq, authorized the Water Pollution Control Board to establish a general permit program for

> coal mining. 327 IAC Article 15, Rule 7 et seq. was promulgated pursuant to the authority in Ind. Code 13-18-18, and established a general permit program to regulate wastewater discharges from surface mining, underground mining, and reclamation projects which utilize sedimentation basin treatment for pit dewatering and surface run-off.
>
> ...
>
> IDEM *cannot* require information from a permit applicant, other than what is required by the general permit rules, nor *may* it consider additional information when issuing a modification of coverage with regard to a general permit. (emphasis added, pp. 9-10)

IDEM further concludes in its Memorandum:

> The applicable regulations in this matter do not require IDEM to consider the impact of this discharge on the water quality.
>
> ...
>
> The general permit rules in 327 IAC 15 do not address an evaluation of the discharge vis-à-vis the water quality standards. As a matter of law, no relief may be granted for HEC/ELPC's claim that IDEM did not evaluate the permit with regard to violations of water quality standards, *as IDEM was not authorized to conduct such an evaluation*. (emphasis added, p. 10)

In sum, IDEM could not more plainly state that it will not comply with 40 CFR § 122.44(d) as to activities allowed by general permit rules. IDEM claims that it is not even authorized to review information necessary to comply with the basic NPDES prohibition on discharges that will cause or contribute to violations of water quality standards. *Contra* 40 CFR §123.63(a)(5). Further, in its Memorandum, IDEM similarly makes clear that it will not and believes it cannot:

- Protect existing beneficial uses (p.11) (*contra* 40 § CFR 131.13(a)(1)),
- Conduct a Tier 2 antidegradation analysis (p.11) (*contra* 40 CFR § 131.12(a)(21),
- Require adequate monitoring (p.12) (*contra* 40 CFR §§ 122.28, 122.44(i)), or

- Give the public adequate notice and an opportunity to comment (p.12) (*contra* 33 U.S.C §§ 1251 (e) and 1342 (a)(1), (b)(3) and (j) and 40 CFR Part 124).

II. EPA should promptly hold a hearing on whether Indiana is administering the NPDES program in accordance with the Clean Water Act.

There are, of course, many mines now operating in Indiana under the illegal general permit rules and more such mines and mine expansions are to come. Just since October 2008, IDEM has authorized at least 44 new or modified discharges from coal mines under Rule 7. The question of whether Indiana is properly administering the NPDES program is certainly not a close or subtle issue; the administering state agency has clearly stated that it does not intend to comply with NPDES rules.

The Clean Water Act requires that a state that has been delegated NPDES permitting authority "shall at all times be in accordance with" the NPDES permit rules and EPA guidance, or be subject to EPA withdrawal of state authority to administer the program. 33 U.S.C. § 1342 (c). To be in compliance with NPDES permit rules, a state must have authority:

> (1) To issue permits which--
> (A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;
> (B) are for fixed terms not exceeding five years; and
> (C) can be terminated or modified for cause including, but not limited to, the following:
> (i) violation of any condition of the permit;
> (ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;
> (iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;
> ...
> (2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act or
> (B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;
> (3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

33 U.S.C. § 1344 (1)

It is well-established that NPDES general permits are still NPDES permits and are thus subject to the requirements applicable to all NPDES permits. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 498-99 (2d Cir. 2005) (In reviewing CAFO general permit, court emphasizes that

states may issue NPDES permits "only where, inter alia, the state permitting programs 'apply and insure compliance with any applicable [effluent limitations and standards]. '" (emphasis as cited)); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 855 (9th Cir. 2003) (Stating with regard to general permits that, "every permit must comply with the standards articulated by the Clean Water Act."); *Or. State Public Interest Research Group, Inc. v. Pac. Coast Seafoods Co.*, 361 F. Supp. 2d 1232, 1236 (D. Or. 2005) ("Substantively, a general permit is no different from an individual permit; it must include the same permit limitations required in individual permits.").

Even in the context of authorizing discharge under a general permit, a state must conduct an individualized review of the discharge to ensure compliance with water quality standards. *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 855 (9th Cir. 2003) (Requiring actual review of every Notice of Intent application to ensure compliance with Clean Water Act requirements); *Ohio Valley Envtl. Coal. v. Horinko*, 279 F. Supp 2d 732, 761-62 (S.D.W. Va. 2003) (Concluding that EPA approval of a general permit that did not require individualized antidegradation review of each discharge was arbitrary and capricious.); *Sierra Club Mackinac Chapter v. Dep't of Environmental Quality*, 747 N.W.2d 321,333 (Mich. Ct. App. 2008) (Holding that the Clean Water Act requires a "meaningful review" of each nutrient management plan prior to authorizing discharge under the general permit.) Further, Clean Water Act regulations mandate that, under a general permit scheme, a state must require an applicant proposing to discharge under a general permit to submit all information necessary to determine compliance with Clean Water Act requirements. 40 C.F.R. § 122.28.

Under 33 U.S.C. § 1342 (c)(3), EPA must hold a hearing on our petition. Any delay in granting the petition will simply allow IDEM to continue disregarding the minimum requirements of federal law to the detriment of human health and the environment in Indiana. Under these circumstances EPA is required to take action to prevent Indiana from continuing to allow irreparable environmental harm. *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987); *Envtl. Def. Fund v. Costle*, 657 F.2d 275 (D.C. Cir. 1981); *Envtl. Def. Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Save the Valley, Inc. v. EPA*, 99 F. Supp. 2d 981 (S.D. Ind. 2000).

Intervention by EPA when a state is failing to meet minimum federal requirements is not without precedent: Region 5 reviewed all Illinois NPDES permits for coal mines and prevented issuance of permits that did not in fact protect water quality for several years prior to the adoption of revised Illinois sulfate standards. (*See* Feb. 25, 2002 Letter of Jo Lynn Traub, Ex. D) Indiana's refusal to comply with Clean Water Act NPDES requirements is far more egregious than the situation was when Region 5 stepped in to oversee Illinois.

Unless means can be devised to prevent the continued issuance of patently illegal permits by Indiana, EPA clearly must act to notify the state of the need for corrective action. Should Indiana fail to take corrective action to cure the fatal flaws in its implementation of the Clean Water Act, EPA must withdraw approval of the Indiana NPDES program.

Sincerely,

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Jesse Kharbanda
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Enclosures

cc: Peter Silva, Assistant Administrator for Water, U.S. EPA
Susan Hedman, Regional Administrator, Region 5, U.S. EPA
Thomas Easterly, Commissioner, IDEM